2001

Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self-Flagellation

Rory K. Little
UC Hastings College of the Law, littler@uchastings.edu

Author: Rory K. Little

Source: South Texas Law Review

Citation: 42 S. Tex. L. Rev. 345 (2001).

Title: *Law Professors as Lawyers: Consultants, Of Counsel, and the Ethics of Self–Flagellation*

LAW PROFESSORS AS LAWYERS: CONSULTANTS, OF COUNSEL, AND THE ETHICS OF SELF-FLAGELLATION

RORY K. LITTLE*

* Professor of Law, University of California, Hastings College of Law, litter@uchastings.edu. My thanks to Professor Teresa Collett, who first invited me to deliver these remarks at the October 2000 South Texas College of Law symposium in Houston (for which, I confess, I was paid travel expenses and an honorarium, and treated quite well) and to the editors of the *South Texas Law Review* for their patience and hard work. I am also grateful for the support received from Hastings Academic Dean Leo Martinez and the Hastings Summer Stipend program. Finally, thanks also to Tera McLaughlin, and particularly Dan Pollack, both Hastings Class of 2002, who provided speedy and insightful research assistance, and to Suzanne Menne for her superlative clerical assistance.

I. INTRODUCTION: LAW PROFESSORS ACTIVELY ACT AS LAWYERS

I think, as does Professor David Luban, that it is a "trivially straightforward" proposition that "[l]aw teachers are, by and large, lawyers."[1] Yet my experience is that many law professors[2] do not perceive themselves as practicing lawyers. "I'm a scholar, not a lawyer," might be the articulation of this self-perception. This self-perception is born out by how many law professors maintain "inactive" Bar memberships (the annual fee for which is much lower than "active"[3]).

"Inactive," however, may well be defined differently by Bar Association officials than by most law professors. For example, in California anyone who "practices law" must be enrolled as an active, rather than inactive, member,[4] and the definition of "practicing law" is broad, arguably encompassing the mere giving of legal advice.[5] Yet

1. David Luban, *Faculty Pro Bono and the Question of Identity*, 49 J. LEGAL EDUC. 58, 60 (1999). Interestingly, Professor Luban himself is not a lawyer. *Id.* at 58 (David Luban is a professor of law and philosophy at Georgetown University).

2. I use the term "law professor" to encompass those law teachers who are full-time faculty members (tenure-tracked, whether tenured or not) at a full-time law school, as opposed to the multitudinous variations of experienced persons who teach at law schools but are not full-time or tenure-tracked. At the University of California, Hastings College of Law ("Hastings"), for example, where I teach, we make ample use of "adjunct" faculty who largely are practicing lawyers who teach two-hour seminars in their "spare" time. This article does not address these teachers, although David Hricik's fine article elsewhere in this issue demonstrates that they are not without their own serious ethical issues. *See generally* David Hricik, *Life in Dark Waters: A Survey of Ethical and Malpractice Issues Confronting Adjunct Law Professors*, 42 S. TEX. L. REV. 345 (2001).

3. *See, e.g.*, California State Bar, *2001 Membership Fee Statement—Mandatory Fees*, *at* http://www.calbar.org/memfee/firstform.htm (last visited Apr. 11, 2001) (indicating that for active members, annual dues are $345, but inactive members pay only $50).

4. CAL. BUS. & PROF. CODE §§ 6006, 6125 (West 1990).

5. *See* Birbrower v. Superior Court, 949 P.2d 1, 5 (Cal. 1998) ("practice of law" includes "legal advice and legal [document] . . . preparation"). Similarly, Washington, D.C., ethics Rule 49 defines "Practice [of] Law" to include "expressing legal opinions" and "providing advice or counsel." D.C. CT. R. 49(b)(2). While this is limited to situations "where there is a client relationship of trust or reliance," that concept is also broadly construed. *Id.* R. 49(b)(2), cmt.; *See, e.g.*, ABA Proposed Model Rule 1.18, *Duties to Prospective Client*, *available at* http://www.abanet.org/cpr/e2k-rule118.html (last visited Apr. 11, 2001).

The ABA recognizes that the "definition of the practice of law . . . varies from one jurisdiction to another." MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. [1] (1999). Giving "advice . . . concerning . . . legal rights or remedies" is one commonly employed test. *See* ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 445 (3d ed. 1996). *Cf.* Richard Zitrin, Comment at AALS Panel on The Ethics of Ethics Consulting 3 (Jan. 9, 1999) (transcript on file with author) ("I think it is practice of law when a student calls up seeking advice").

law professors who give advice about their area of expertise to current or former students working at law firms, or to other friends or relatives calling for advice, or who sit on committees of the local Bar Association or other legal organizations and advise about ongoing legal issues or matters, or who agree to review leases or contracts for local civic organizations, probably do not believe that they are "practicing" law. Indeed, my anecdotal belief is that unless law professors are actively working on particular legal cases or matters, they generally do not consider themselves to be practicing lawyers. Whether their State Bars would agree is unknown. But the question whether all law professors should maintain an "active" license or run the risk of disciplinary inquiry is not obviously answered in the negative.

I am not here to settle this debate, but merely to mildly engage a weak version of its initial premise: many law professors are lawyers—defined for present purposes as dues-paying members of some State's Bar. A number of these law professor lawyers take on paid legal work, as expert witnesses/consultants or as lawyers representing clients. Finally, a small but significant number have formally assumed "of counsel" positions with law firms.[6]

The practice of law professors practicing law has recently come under critical examination. This is somewhat ironic, given that most law schools were begun by faculties of practicing lawyers.[7] My goal today is to offer a few thoughts on the reality of "law professors as lawyers," and to suggest that some of the ethical concern that has been expressed about the phenomenon is overblown. Rather than engage in self-flagellation regarding our practicing colleagues, we law professors ought to acknowledge that there are strong potential benefits and actively move forward to realize them. Practicing law professors are unlikely to overwhelm the Academy; scholarship requirements for law professor tenure and generally below-market teaching salaries will continue to attract, for the most part, only "compulsive scholars." But a small number of practicing law professors is valuable, not cause for concern. It leavens the diversity of

6. *See infra*, Appendix (Survey of AALS Law Schools Regarding "Of Counsel" Professors on the Full-Time Faculty) (twenty-seven of sixty-six AALS schools reported a total of forty-four "of counsel" faculty).

7. *See, e.g.*, ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 3 (1983) (noting that the first law schools "were generally outgrowths of the law offices of practitioners"); James Barr Ames, Address, *The Vocation of the Law Professor* (1901), *in* II THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES 1000, 1004 (Steve Sheppard ed., 1999) (reporting that as of 1900, "three fourths [of all law professors] are active in practice or upon the Bench").

educational opportunities for students and, properly harnessed, can benefit the entire law school and its greater community. We should seek to regulate only ethical abuses, rather than prohibit law professors' lawyering generally, while at the same time turning the practice (pun intended) to our and our students' advantage.

II. THROAT-CLEARING COMMENTS

Sensible, or at least satisfying, discussion of "the ethics of law professors" is often difficult because of a number of related problems. It is unfortunately necessary to attempt to clear, or at least identify, the underbrush before we can get to the fun stuff.

First, in our discussions, we are unclear about exactly what sort of role we are addressing: professor as scholar, professor as counselor and advisor to students, professor as kibbitzer with lawyer-friends, professor as media commentator, professor as community organization Board member, professor as expert legal witness or consultant, professor as actual representative lawyer for a client, or professor listed as "of counsel" on a law firm's letterhead. In reality professors are human beings and participate in all the diverse, complicated roles that educated professionals are often asked to perform.

Second, we tend to either get trapped in details or ignore them entirely. For example, we begin to focus on the intricacies of the law professor's role(s) as they relate to technical issues, such as whether the professor should or can obtain malpractice insurance or how precisely to draft your retainer letter.[8] Or, at the other extreme, we discuss the philosophies of the various roles—scholar, student counselor, lawyer—without anchoring the discussion to the realities of teaching, practicing law, and attempting to lead a full professional life in this rapidly changing, expensive, MDP[9] world.

Third, we do not pause to define what rules-structure, if any, we are assuming: the American Bar Association ("ABA") Model Code of Professional Responsibility ("Model Code"), the Model Rules of Professional Conduct ("Model Rules") or the specific rules of our

8. *E.g.*, The Ethics of Ethics Consulting, *infra* note 27, at 5–6 (discussing the details of retainer letters used by law professors); *cf. id.* at 7 (attending Law Professor's comment: "I was surprised that all we have talked about is how to make more money . . . . There are deep questions involved . . . .").

9. Multi-Disciplinary Practice. *See* Bruce A. Green, *Reflections on the Ethics of Legal Academics: Law Schools as MDPs; or, Should Law Professors Practice What They Teach?*, 42 S. TEX. L. REV. 301 (2001); *infra* note 98.

states, or simply the Laws of Nature. When we say "you can't do that," or "yes, you clearly can," we tend to shift structures as we imagine they best fit our predilections. And when challenged to choose, we find ourselves lost in a battle of details (see "Second" above).

In what follows, I am addressing concerns that may arise when full-time law professors also engage in outside, paid legal work. I attempt to anchor my comments to the realities of law professoring and practice as I have experienced them. And I assume no specific ethics rule structure, but rather stick to what I think are generally-accepted legal ethics concepts (like the definition of "of counsel").

III. A BRIEF ACCOUNT OF SIGNIFICANCE AND HISTORY

According to various sources, in 2001 there are roughly 8827 full-time law professors teaching some 125,000 students at 185 ABA-accredited law schools in the United States.[10] If you include part-time or non-tenure-track teachers as well as three dozen unaccredited law schools and their professors,[11] the ranks of American law professors and students are even larger. Nevertheless, when placed next to this country's population of over 281 million,[12] the number of law professors and their students is plainly insignificant. Indeed, the estimate of 1.2 million licensed attorneys in the United States[13] represents only 0.4% of the nation's populace, and law professors represent only 0.7% of this already small percentage.[14]

The point? Most Americans will never have substantive contact with a law professor, other than perhaps seeing one briefly as a talking

10. *See* Association of American Law Schools, *Statistical Report on Law School Faculty*, *at* http://www.aals.org/statistics/index.htm#full (last visited Apr. 2, 2001) [hereinafter AALS Statistics] (referencing the number of professors); Victoria Rivkin, *Law Schools Reach out to Hispanic Applicants*, 224 N.Y. L.J. 1 (2000) (noting the number of law students); American Bar Association, *ABA Approved Law Schools*, *at* http://www.abanet.org/legaled/approvedlawschools/approval.html (last visited Apr. 2, 2001) (listing the number of accredited law schools in the United States). By way of comparison, a century ago the count was 105 law schools (accreditation not yet having been invented) serving only 13,000 law students. Ames, *supra* note 7, at 1003.

11. *See* Katherine S. Mangan, *A Struggling Law School Turns Its Management over to a Chain of Proprietary Schools*, CHRON. OF HIGHER EDUC., Sept. 24, 1999, at A52 (showing an "estimated 35" unaccredited law schools in the United States).

12. U.S. Census Bureau, *Population Change and Distribution*, *at* http://www.cache.census.gov/population/cen2000/c2kbr01-2.pdf (last visited Apr. 2, 2001) [hereinafter Census].

13. *See* Frank J. Murray, *Special Report: The Rule of Lawyers*, WASH. TIMES, July 20, 2000, at A1.

14. *See* Census, *supra* note 12.

head on the nightly news.

In light of this small potential audience, I found one of the most difficult aspects of my topic today to be stating its significance. Initially (and with apologies to my generous and hard-working hosts), one can feel that the topic of "law professors' ethics" is trivial and even a bit narcissistic: who, beside "us," really cares?

While I am relatively confident that the truthful answer to this last question is "virtually no one," I have developed a firm belief that the topic is itself non-trivial, more than self-indulgent, and meaningful beyond the confines of academe. Indeed, to the extent that we believe that law and lawyers help shape our society and play a vital role in managing the "community" of our country (*e.g.*, lawyers as governmental leaders and influential policymakers, lawsuits rather than trial-by-combat or open warfare), then the ethics of those who educate and train America's lawyers, judges, and governmental leaders ought to have broad significance.

It thus is mildly surprising that the history of "law professors' ethics" is relatively short and shallow. While the ABA began its efforts to codify ethical standards for lawyers roughly a century ago, and the origins of that movement can be traced to before the Civil War,[15] concerns about the ethics of law professors have been expressed only in the last forty years. Even today, no comprehensive codification has been accomplished (which may be all to the good, depending on your views about academic freedom and whether there is really a "problem" that needs to be "fixed").

Thus, in 1962, the Association of American Law Schools ("AALS") noted that "[l]aw teachers have responsibilities that do not coincide with those of lawyers, judges or teachers .... [S]tandards of ethical conduct embodying the high ideals of two great professions, law and teaching, should be formulated. This has not been done."[16] Eight years later, a special AALS committee again reported on the topic, noting that "law teachers do constantly face problems of professional responsibility for which there is at present very little guidance ...."[17] Yet that committee recommended that no formal

15. *See generally* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 2.6.2 (1986) (detailing the history behind the adoption of the 1908 ABA Canons of Ethics).

16. ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED READINGS ON THE LEGAL PROFESSION 363 (1962) [hereinafter SELECTED READINGS]. The Chairman of the Committee that produced this volume was Professor John S. Bradway, then Dean of the Hastings College of Law. *Id.* at VII.

17. Robert B. McKay, *Ethical Standards for Law Teachers*, 25 ARK. L. REV. 44, 45 n.5 (1971) (quoting the Report of Special Comm. on the Prof'l Responsibilities of Law Teachers, 1970 AALS Proceedings 72–73).

statement of good practices be formulated at that time because it would be "premature," "useless," or "misleading."[18]

In 1971 Dean Robert McKay of New York University Law School ("NYU") published the first law review article I have found that addresses the topic. Dean McKay again noted that "[t]here is . . . an almost embarrassing silence on the ethical considerations that apply to lawyers who function as law teachers."[19] He then proposed (in the style of the ABA Canons that had governed the lawyering profession since 1908) nine "Canons" of ethics for law teachers, with detailed commentary.[20] Thirty years later, Dean McKay's article still stands as the most detailed effort devoted to the topic.

Despite Dean McKay's effort and influence, however, attention to the topic was sporadic at best over the next twenty years. A decade later, when Dean McKay's NYU successor, Norman Redlich, published an essay entitled *Professional Responsibility of Law Teachers*, he still lamented that "very little attention has been paid" and the law professor "segment of the legal profession" remains "uncoded."[21] Six years later, Hofstra University Law Professor Monroe Freedman again noted that "there is no Model Rules of Professional Conduct for Law Professors" when he published his views on *Three Neglected Questions*[22] in the area.[23]

Finally, in 1989, the AALS published its *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities* ("AALS Statement" or "Statement").[24] Although this document would likely be influential in any attempt to

---

18. *Id.*

19. *Id.* at 45.

20. *Id.* at 46–66.

21. Norman Redlich, *Professional Responsibility of Law Teachers*, 29 CLEV. ST. L. REV. 623, 623 (1980).

22. Monroe H. Freedman, *The Professional Responsibility of the Law Professor: Three Neglected Questions*, 39 VAND. L. REV. 275, 276 (1986). The three neglected questions that Professor Freedman addressed were "Sex with Students," "Plagiarism of Student Work," and "Due Process in Grading." *Id.* Professor Freedman's proposed solution on this last topic (law students' grading disputes) was, as one might expect, creative and provocative: he suggested allowing panels of students to evaluate and settle their fellow students' disputes regarding the professor's grade. *Id.* I recommend this section as fascinating debate material for law professors and students alike.

23. As an aside, I take it to be purely coincidental that these three leading articles addressing law professors' ethics were all written by New York law professors, a tradition carried on nobly by Fordham University School of Law Professor Bruce Green in this issue. *See* Green, *supra* note 9, at 301.

24. *See* ASSOCIATION OF AMERICAN LAW SCHOOLS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, *in* 2000 HANDBOOK 89–94 (2000) [hereinafter AALS Statement].

discipline or sue a law professor, it is entirely hortatory. But more significantly, I would wager it is unknown to many law professors. For example, although I began teaching full-time—teaching legal ethics, no less—over six years ago at Hastings, a fairly prominent law school, I have no memory of ever being given a copy of this AALS Statement or even advised of its existence. I found it only when I began work on this paper. When I showed it to my colleagues in preparation for this talk, a number expressed surprise. I am unwilling to assume this demonstrates merely an unusual ethical turbidity at Hastings.

IV. THE AALS STATEMENT OF GOOD PRACTICES

As printed from the AALS website, the Statement of Good Practices occupies four single-spaced pages.[25] It addresses five general topics: Responsibilities (1) To Students; (2) As Scholars; (3) To Colleagues; (4) To the Law School and University; and (5) To the Bar and General Public.[26] In 1999 the AALS announced that it was considering amendments to the Statement that would address the topic of outside consulting work done by law professors, which sparked debate at the annual AALS meeting in January 2000 (following panels at a few prior annual meetings that had touched upon the topic)[27] and some criticism in the popular press.[28]

Since this particular topic—law professors acting as legal consultants or "of counsel"—is my topic today, I will ignore the other

25. ASSOCIATION OF AMERICAN LAW SCHOOLS, *Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities*, *available at* http://www.aals.org/ethic.html (last visited Apr. 2, 2001).

26. *Id.*

27. A panel entitled "We Know What You Did Last Summer—Now Who Paid For It?," presented a "mock hearing on the discussion draft" of proposed changes to the AALS Statement at the AALS's January 2000 annual meeting. *Committee Proposes Revision of Disclosure Rule on Funding for Research*, THE NEWSLETTER (Ass'n of Am. Law Sch.) Nov. 2000, at 8 [hereinafter AALS Newsletter]; Carol Goldberg, Address at the AALS 2000 Annual Meeting 1 (Jan. 2000) (unofficial transcript on file with author). Other relevant AALS programs have included *The Ethics of Ethics Consulting* and *New Perspectives on Traditional Legal Ethics*. New Perspectives on Traditional Legal Ethics, AALS Annual Meeting (Jan. 7, 1998) (unofficial transcript on file with author) [hereinafter New Perspectives on Traditional Legal Ethics]; The Ethics of Ethics Consulting, AALS Section Meeting (Jan. 9, 1999) (unofficial transcript on file with author) [hereinafter The Ethics of Ethics Consulting]; *See* AALS Panel, Professors in the Marketplace 17–18 (Jan. 9, 1999) (transcript on file with author) [hereinafter Professors in the Marketplace].

28. *E.g.*, Richard B. Schmitt, *Rules May Require Law Professors to Disclose Fees*, WALL ST. J., Jan. 31, 2000, at B1; Claudia Rosenbaum, *Coming Clean: A Proposal Being Circulated to Law Schools Would Set Disclosure Guidelines for Professors Whose Opinions Are Sometimes Purchased*, S.F. DAILY J., June 26, 2000, at 1.

topics addressed in the AALS Statement. I would hope, however, that every law professor in the country reads the Statement in full. I intend to distribute it as part of my basic Professional Responsibility course from now on, as a point of comparison to the far more detailed Model Rules of Professional Conduct that govern most lawyers, as well as fodder for independent discussion.

With regard to outside legal work by law professors, the current AALS Statement provides general direction regarding three discreet issues:

> 1. T*eaching*: "If a professor expresses views in class that were espoused in representing a client or in consulting, the professor should make appropriate disclosure."[29]
>
> 2. *Scholarship*: "A law professor has a responsibility to preserve the integrity and independence of legal scholarship. Sponsored or remunerated research should always be acknowledged with full disclosure of the interests of the parties. If views expressed in an article were also espoused in the course of representation of a client or in consulting, this should be acknowledged."[30]
>
> 3. *Time*: "Excessive involvement in outside activities . . . tends to reduce the time that the professor has to meet obligations to students, colleagues, and the law school. A professor thus has a responsibility both to adhere to a university's specific limitations on outside activity and to assure that outside activities do not significantly diminish the professor's availability to meet institutional obligations. Professors should comply with applicable laws and university regulations and policies concerning the use of university funds, personnel, and property in connection with such activities.[31]

In November 2000 (after this lecture was delivered), the AALS issued a Revised Draft of proposed changes to the Statement.[32] Then, in March 2001, a new draft was prepared for the AALS Executive Committee.[33] The latest proposed Statement (which still occupies the status of a "draft" as of September 2001 because the AALS has not yet formally adopted it) ("Draft") would add the following statements to the current AALS Statement:[34]

---

29. AALS Statement, *supra* note 24, at 90.
30. *Id.* at 92.
31. *Id.* at 93.
32. AALS Newsletter, *supra* note 27, at 9.
33. E-mail from Professor Harry G. Prince, Deputy Director of the AALS, to Rory K. Little (April 17, 2001, 17:48:50 CST) (copy on file with the author) [hereinafter Draft] (providing the draft of the revisions to the AALS Statement as of March 2, 2001).
34. In May 2001, a draft of the article you are now reading was provided to the

Responsibilities to Students: If a professor expresses in class or in course materials views that were developed in funded activities or representation as described in Section II, the professor should make appropriate disclosure to the enrolled students . . . .

Responsibilities as Scholars: A law professor has a responsibility to preserve the integrity and independence of legal scholarship undertaken in a professorial capacity.

A law professor should disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity. Disclosure is not required for normal academic compensation, such as salary and research grants from academic institutions or book royalties. Disclosure of material facts should include: (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where disclosure is proscribed by the governing Code or Rules of Professional Conduct. If such Code or the Rules prohibit a professor from revealing the identity of the funding source, then the professor should generally describe the interest represented.

A law professor should also disclose the fact that views or analysis expressed in any covered activity were developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor. Disclosure should include the identity of any client, where practicable and where not prohibited by the governing Code or Rules of Professional Conduct. If such code or the Rules prohibit a professor from revealing the identity of the client, then the professor should generally describe the client or interest represented, or both.

Covered activities include any published work, or oral or written presentation to conferences, drafting committees, legislatures, law reform bodies, or the like. A law professor should make, to the extent possible, all disclosures discussed in this policy at the earliest possible time. The earliest possible time may be when the professor is invited to produce the written work for publication or to make a presentation, or when the professor submits the written work for publication or delivers the presentation.

AALS as a form of comment on the March 2001 draft.

> *Responsibilities to Bar & General Public*: If a professor expresses in statements to the media or in other public fora views that were developed in funded activities or representation as described in Section II, the professor should make appropriate disclosure within the statement or to the sponsor when invited to speak.[35]

The March 2001 draft also contains the following "Commentary." Whether this would formally be published together with the new Statement is unclear:

> 1. The committee decided to omit a requirement that the precise amount of funding be disclosed which eliminates need to predict future compensation.
>
> 2. The committee decided to require that a professor disclose the identity of the funding source or client to the fullest extent permissible under the governing Code or Rules of Professional Conduct.
>
> 3. The committee decided that this material should be limited to Section II, Responsibilities as Scholars, of the current Statement of Good Practices by Law Professors, and to propose a modest revision to Section I, Responsibilities to Students, and to add a similar provision to Section V, Responsibilities to the Bar and General Public, regarding the need for professors to make the required disclosures to students in class and to media who request the professor to make public comment or statements.
>
> 4. The committee decided to limit required disclosure to economic interests external to normal academic compensation.
>
> 5. Disclosure is not required for normal academic compensation, such as salary and research grants from academic institutions, or book royalties.[36]

The March 2001 draft is a great improvement over earlier drafts. In fact all but a few of the critical comments I had on prior drafts when I first delivered this paper in October 2000 have been resolved. The hard work of the small group that has honed the proposed changes should be applauded. What follows are two brief commendations and four constructive—I hope—criticisms.

First, the requirement to disclose conditions that a funding source places on a professor's future expression of views in the area seems absolutely correct. One can hardly imagine a greater incursion on the shared value of "academic freedom" than a scholar who has expressly

35. Draft, *supra* note 33.
36. *Id.*

contracted *not* to express any competing or mediating opinions that he or she may actually have. Far more than mere payments without strings, such blatant academic "silencing by contract" is an egregious indication of bias that should be disclosed.

Similarly, the decision to *not* require that the precise amount of nonacademic compensation be disclosed is exactly right: personal privacy as to this should be honored.[37] Professors who want to dispel an inference of bias can disclose how *little* they were paid if they like.

But (here come the criticisms), I also think that there ought to be a *de minimis* exemption from *all* disclosure: a cab ride, a good meal, a cheap bookbag, or the like ought to be entirely, and expressly, excluded from this Draft. Requiring disclosure of trivial benefits trivializes the disclosure ideal.

Second, the Draft would appear to require that I must disclose the $1,000 honorarium I was paid for presenting a version of this very paper at the South Texas College of Law ("payment for . . . any . . . conference presentation").[38] But engenderment of bias by payment from such a non-partisan scholarly source seems unlikely.[39] Therefore, a disclosure requirement for purely scholarly conferences seems needlessly intrusive.

Third, the suggestion that ethics codes might prohibit disclosure of a payor's identity is made without reference to the abundance of caselaw holding that the identity of a paying client is not so protected.[40] In effect, this suggestion invites law professors not to identify their outside payors. It also suggests such payors are "clients" under the ethics rules—itself a highly debatable proposition. While the caselaw is not perfectly uniform nor crystal clear regarding client identity disclosures,[41] the AALS ought not suggest more

37. Not all observers would agree with this point, but rather would mandate far more precise disclosure requirements. *See, e.g.*, Richard Lippitt, Note, *Intellectual Honesty, Industry and Interest-Sponsored Professorial Works, and Full Disclosure: Is the Viewpoint Earning the Money, or, is the Money Earning the Viewpoint?*, WAYNE L. REV. (forthcoming 2001) (copy on file with author).

38. *See supra* text accompanying note * (making such disclosure).

39. It is possible that the drafters would, instead, put an honorarium from a non-partisan scholarly conference under the heading of non-reportable "normal academic compensation" (although honorariums are, in my possibly modest experience, far from routine). Such an intent, however, is unclear in the March 2001 Draft. *Id.*

40. *See, e.g.*, *In re* Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000) ("'[T]he identity of the client . . . [is] usually not protected from disclosure by the attorney-client privilege'") (quoting Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992)).

41. *See id.* at 520–21 (noting that other courts have, at times, noted possible exceptions).

confidentiality than ethical rules actually require, if *disclosure* is actually the goal.

Fourth, the Draft says nothing express about repeated disclosures.[42] But one imagines that disclosure, if truly necessary to ward off false impressions, should be made every time the professor repeats his or her previously paid-for (or influenced) views. Conversely, perhaps the obligation to make a disclosure should expire after some period of years. These points should be clarified.

V. "FULL-TIME" LAW PROFESSORS: A SLIPPERY CONCEPT

Aside from the AALS Statement, which is of course non-binding but nevertheless (one hopes) influential, there are two other sources of constraint on law professors' outside legal work. One is indirect: ABA Accreditation Standard 402, which frowns upon law professors maintaining "outside business activities."[43] Standard 402 is discussed in some detail below.[44]

Another source of ethical constraints upon law professors might be the general Model Rules for lawyers, which have been adopted, in various forms, by almost every jurisdiction in the United States.[45] Such rules apply, of course, only to professors who are members (even if "inactive") of a State Bar. However, this should be virtually all law professors since, as I have suggested above, law professors who give legal advice—and I believe virtually all do—but are not members of a Bar run the risk of "unauthorized practice of law" problems.[46] But in reality, existing ethics rules say nothing special about limitations on law professors or indeed on any part-time law practitioners.

---

42. *See* Draft, *supra* note 33.

43. *See infra* text accompanying notes 47–55. The ABA publishes accreditation standards, and receiving accreditation from the ABA is a highly sought after status. ABA, *Standards for Approval of Law Schools*, Standard 402, *available at* http://abanet.org/legaled/standards/chapter4.html (last visited April 12, 2001) [hereinafter ABA Accreditation Standards]. Indeed, some States specify that only graduates of ABA-accredited law schools may take their Bar exams. *E.g.*, GEORGIA STATE BAR RULE 2-101 (2000); KANSAS SUP. CT. RULE 702 (2000); MONTANA STATE BAR ADMIN. RULE I(B); 5 OKLA. STATE CHAP. 1, app. 5, Rule 4 (2000). Thus law schools generally try to comply with the ABA Accreditation Standards.

44. *See infra* text accompanying notes 47–55.

45. *See* STEPHEN GILLERS & ROY D. SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2001) ("[A]bout forty jurisdictions have adopted substantial portions of the Model Rules."). Other jurisdictions adopt Model Rules language in cases or statutes without attribution.

46. *See supra* notes 4–6.

A. *ABA Standard 402(c)*

The ABA requires that an accredited law school have a faculty that possesses "a high degree of competence."[47] The categories of evaluation for determining competence include: "education, classroom teaching ability, experience in teaching or practice, and scholarly research and writing."[48]

The Accreditation Standards imply that only "full-time faculty" can competently carry out the bulk of a law school's educational mission.[49] Thus, to receive accreditation, a law school must employ a certain number of "full-time" teachers, so that the ratio of students to full-time faculty is no more than thirty to one and preferably twenty to one.[50] Thus, at a school like Hastings with roughly 1200 students spread over 3 years' worth of graduating classes, at least 40, and more preferably 60, professors need to be "full-time" to avoid raising accreditation questions.[51]

But of course, lawyers being what they are, a phrase like "full-time" cannot be used without definition. And so you find a definition of "full-time faculty member" in ABA Accreditation Standard 402(c):

> A full-time faculty member is one who during the academic year devotes substantially all working time to teaching and legal scholarship, participates in law school governance and service, *has no outside office or business activities*, and whose outside professional activities, if any, are limited to those that relate to major academic interests or enrich the faculty member's capacity as scholar and teacher, are of service to the legal profession and the public generally, and do not unduly interfere with one's responsibility as a faculty member.[52]

And, of course, law professors being what they are, even this definitional Accreditation Standard requires an "interpretative" note. Thus Interpretation 402-4 states that:

> Regularly engaging in law practice, *having an ongoing relationship with a law firm or a business*, being named on a law firm letterhead, or having a professional telephone listing is

47. ABA Accreditation Standards, *supra* note 43, at Standard 401 ("The Faculty: Qualifications").

48. *Id.*

49. *See id.* Standard 403(a) ("The major burden of a law school's educational progress rests upon the full-time faculty.").

50. *Id.* Standard 402 ("Size of Full-Time Faculty"); *Id.* Interpretation 402-2 ("A ratio of 30:1 . . . presumptively indicates that a law school does not comply with the Standards.").

51. I am happy to report that with 48 full-time tenured or tenure-track professors, Hastings easily meets this criterium, with a 25:1 ratio.

52. ABA Accreditation Standards, *supra* note 43, Standard 402(c) (emphasis added).

> *prima facie evidence* that an individual has 'outside office or business activities' and is not a full-time faculty member under this Standard. *If there is prima facie evidence that an individual is not a full-time faculty member, a law school shall demonstrate that the individual has a full-time commitment to teaching, research and public service*, is available to students, and is able to participate in the governance of the institution to the same extent expected of full-time faculty.[53]

Thus the clarity of "no outside office or business activities" in Standard 402(c) dissolves by interpretation into concepts like "prima facie evidence" and "full-time commitment," which evidently can be satisfied even with some professorial practice of part-time outside legal work.[54] Presumably the *Clintonesque* need to have an "interpretation" of what "no outside . . . business activities" means is driven by the reality of talented, scholarly, and committed law professors who also manage to engage in remunerative outside activities. Professors Arthur Miller, Charles Ogletree, Lawrence Tribe, and (to demonstrate that it is not just a Harvard problem) Laurie Levinson come immediately to my mind.

B. Roles of Law Professors Acting as Lawyers

Law professors can work as lawyers in at least three ways: (1) they can occasionally advise on legal matters on an *ad hoc*, unpaid ("pro bono") basis; (2) they can independently take on paid legal matters for clients, but again on an *ad hoc* (even if regular) basis; or (3) they can ally themselves with a particular law firm on an ongoing basis, with that firm serving as a regular source of business for the lawyer-professor.[55] I will refer to these three possible roles of professorial lawyering as (1) Consultant, (2) Lawyer, and (3) Of Counsel.[56]

---

53. *Id.* Interpretation 402-4 (emphasis added).

54. *Id.*

55. A January 1999 AALS annual meeting panel entitled *The Ethics of Ethics Consulting* featured a number of well-known law teachers addressing some of these professional roles. The Ethics of Ethics Consulting, *supra* note 27.

56. A fourth, not uncommon, role for law professors is serving as an expert witness on legal, or legal ethics, issues. Interestingly, however, the ABA's Standing Committee on Legal Ethics has opined that a lawyer acting as an expert witness is *not* acting as a lawyer subject to the ethics rules. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 97-407 (1997), *reprinted in* 3 ABA, FORMAL AND INFORMAL ETHICS OPINIONS: 1983-1998 440 (2000) [hereinafter ABA FORMAL OPINIONS]. ("Lawyer as Expert Witness or Expert Consultant"). The Committee was careful to note, however, that the difference between the expert witness role and that of an "expert consultant" can "become blurred in actual practice," and that expert legal consultants (as opposed to solely "testifying witnesses") are

C. *Criticisms of Law Professors Acting as Lawyers*

The ethical dangers perceived to flow from professors who also act as lawyers in any capacity are obvious from the AALS Statement itself: "Time" and "Bias."[57] Time can pose a problem in all aspects of a law professor's job, and bias can arise both in the classroom and in scholarship.

The time critique is obvious. Too much time spent on outside activities (presumably of *any* kind, including hobbies, exercise, or "pro bono" or civic activities, as well as remunerative lawyering work) can make a professor less effective, to the point of failing in his or her duties to students, colleagues, and the school. This critique, of course, begs the question of just what these duties are and how far they go. But the general critique seems unarguable: law professors must devote sufficient time to their professional duties or they risk not being a "professor" (whatever that may precisely be defined as) at all.

The Bias criticism also seems, as a general matter, to be obvious and unarguable. If a law professor were simultaneously employed as General Counsel to a corporation (imagine Microsoft), he or she reasonably could be presumed to be biased on certain legal issues relevant to the corporation's business. Two presumptions operate here: first, that professors should be unbiased (or at least open-minded) and not beholden to any particular interest group or actor in their field; and second, that "interest follows money," such that even a "professor" is likely to develop a bias favoring those who pay him or her well. As Professor Andrew Kaufman has said, "I came into teaching after practicing 10 years, and I knew how I behaved as a lawyer. I knew I was weak and that representing a client for money led me to see things the way the client saw them."[58] It is an immutable truth, as succinctly stated in pop music two decades ago, that "money changes everything."[59]

But as obvious as the foregoing may be, it also seems obvious that both of these premises can be questioned, and neither is necessarily

---

"bound by all of the Model Rules" of Professional Responsibility. *Id.* at 444. In the interests of full disclosure, I was a member of the ABA Committee that issued this opinion, and I mildly dissented from the full implications of this distinction. *See id.* at 446.

57. *See generally* AALS Statement, *supra* note 24 (emphasizing disclosure and minimization of professorial bias as well as sufficient dedication of time to teaching and scholarly activity).

58. The Ethics of Ethics Consulting, *supra* note 27, at 8.

59. Cyndi Lauper, *Money Changes Everything*, *at* http://www.cyndilauper.com/song_det.asp?shname=mce (last visited Oct. 17, 2000) (written by Tom Gray, first performed by "The Brains" and made popular by singer Cyndi Lauper in 1984).

true in all instances. Nevertheless, as a general rule I believe they reflect views held within the profession of Law Professoring and indeed by many members of the public (if they were in fact ever to consider the issue).

Thus, we hear some criticism of law professors who also practice law. The issue of too much time is addressed in the AALS accreditation standards: if a law professor spends too much time on outside lawyering (or at least is too obvious about it), his or her school runs the risk of being "dinged" by the ABA.[60] Therefore, most law school Deans are critical if more than a few professors hold themselves out as "of counsel" to law firms or work too much on outside legal matters.

The issue of bias, however, is not addressed in any accreditation standard, and the current AALS Statement is viewed as too general and, therefore, somewhat toothless.[61] The popular press (popular, at least, among lawyers if not the general public) has taken note of the problem of undisclosed bias.[62] In December 1997, law professors Jack Coffee and Susan Koniak, recognized legal ethics specialists, wrote to the AALS suggesting that more specificity was needed.[63] This letter instigated the current proposed changes to the AALS Statement, discussed above, which are intended to set standards to address the issue.[64]

D. The Influence of Money

I have heard some people argue that paid professor consulting is no different than other types of outside work (for example, pro bono legal work, treatise writing, or Bar course lecturing) or even time-consuming hobbies (such as golf, gardening, or having three children). All such activities take time and "distract" from scholarship and

60. *See* ABA Accreditation Standards, *supra* note 43.

61. This is why the AALS has been considering revisions to the Statement for the past two years. *See* text accompanying notes 32–35; *see also infra* notes 62–66.

62. *See* Elizabeth Amon, *Exxon Bankrolls Critics of Punitives*, THE NAT'L LAW. J., May 17, 1999, at A1 (reporting that Exxon contributed to scholarly research into punitive damages after being forced to pay the largest award of jury damages up until that point); Schmitt, *supra* note 29, at B1 (asking if law professors who espouse opinions should have to disclose payments from industry or interest groups).

63. Letter from John C. Coffee, Jr., Columbia University School of Law and Susan P. Koniak, Boston University Law School to Deborah Rhode, then-incoming President of AALS 1 (Dec. 17, 1997) (on file with author).

64. Carol Goldberg, We Know What You Did Last Summer—Now, Who Paid for It?, Panel Commentary at AALS Annual Meeting 1 (Jan. 2000) (unofficial transcript on file with author).

teaching.

I was initially attracted by these arguments. But upon analysis, I find them to be sophistry. There is a difference, and to my mind a significant difference, between paid outside legal work and non-remunerative activities.

First, gardening, golf, and children are obviously different from paid consulting because they influence only one axis of the problem: time. Too much golf or gardening can interfere with the obligations of a professor to students, colleagues, and the institution just as seriously as too much consulting. But on the other axes, *i.e.*, purity of scholarship and freedom from nonmeritorious bias, golf and gardening are unlikely to have any substantive influence.

I think significant differences are also present when comparing paid legal consulting work to unpaid "pro bono" legal work. The difference is the influence that money can have on choice. We often do things for money that we otherwise might not choose to do. Thus money can influence scholarship (not inevitably will, but can) in a way that pro bono work cannot. Cognitive dissonance and its resolution being what it is, working for any cause can transform a person into a committed advocate, whether paid or not.[65] However, in my experience, rational people simply do not commit to causes for free unless they already believe in, or are predisposed to believe in, the cause.

On the other hand, I believe that some law professors *will* accept cases or issues on which they have no developed position, purely because they are being paid. That is, a law professor may take on a research project for pay, which he or she simply would not have pursued had money not been offered. In such instances, where the law professor has no previously-developed view or position, I firmly believe that, often, "interest follows income."[66] Talented advocates are capable of genuinely rationalizing any position. Thus, the paid advocate often becomes a believer in the cause. But this transforms scholarship from an avenue of pure choice to one of money followed by belief. Therefore, I think paid scholarship is significantly different from scholarship developed out of unpaid, even if intense, commitment. It threatens far more directly the concept of "purity," or freedom from extraneous bias, in scholarship.

---

65. *See generally* COGNITIVE DISSONANCE: PROGRESS ON A PIVOTAL THEORY IN SOCIAL PSYCHOLOGY (Eddie Harmon-Jones & Judson Mills eds., 1999).

66. *Cf.* Phillips v. Washington Legal Found., 524 U.S. 156, 166 (1998) (reciting the common law rule that "interest follows principal").

VI. THE SPECIAL PROBLEM OF LAW PROFESSORS ACTING AS "OF COUNSEL"

A law professor who gives legal advice to students, family, and friends is, I think, "practicing" law,[67] but presents little challenge to the "purity" of professorship. Not only is such advice not threatening to the values advocated in the AALS Statement,[68] but it is a phenomenon that is entirely foreseeable, understandable, and impossible to stop in any case.

Similarly, I see little reason to be concerned about law professors who take on the occasional case or expert witnessing/consultant matter, once appropriate disclosures are made. So long as time is well-managed and the values of the AALS Statement are respected, such occasional practice not only presents no threat to scholarship or teaching, but also almost certainly contributes to the professor's understanding of the law and how it really operates. This translates into making the professor a better teacher, advisor, and scholar, and thus directly benefits his or her professorial role.

A somewhat different phenomenon, however, is law professors who formally agree to serve as "of counsel" to law firms or legal organizations. Because such a relationship requires, by definition, a "close and regular" relationship between the law professor and the law firm, it can create problems of the appearance of impropriety as well as the reality.

ABA Formal Ethics Opinion 84-351 states that an "of counsel" lawyering relationship "must be close and regular, continuing and semi-permanent, and not merely that of forwarder-receiver of legal business."[69] This standard was drawn from the 1969 ABA Ethical Code's DR2-102(A)(4), which required that an attorney listed as "of counsel" have "a continuing relationship" with the law firm.[70] As the ABA's Standing Committee on Legal Ethics noted in 1990, the term "of counsel" has no precise meaning, but rather is used as a catch-all descriptive: while it plainly means neither a full-time partner nor associate, it is otherwise used variously to describe four general types of relationships: the "part-time practitioner," the "retired partner . . .

67. *See supra* notes 4–6. Thus, it is my view that most law professors should maintain active Bar licenses.

68. *See* AALS Statement, *supra* note 24.

69. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 84-351 (1984), *reprinted in* 3 ABA FORMAL OPINIONS, *supra* note 56, at 4, 8 ("Letterhead Designation of 'Affiliated' or 'Associated' Law Firms").

70. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 330 (1972), *reprinted in* 2 ABA FORMAL OPINIONS, *supra* note 56, at 67, 69.

who . . . remains associated with the firm," the "probationary partner-to-be," and the lawyer having "permanent status in between those of partner and associate . . . but not having the quality of tenure . . . ."[71] The Restatement (Third) of the Law Governing Lawyers ("the Restatement") adopts a similar definition,[72] and every state that has examined the issue endorses a similar concept.[73]

The necessity to define and limit the "of counsel" relationship arises from the general duty not to mislead the public.[74] As one practicing Bar Association Ethics Committee has written, "[a] firm listing a lawyer as 'of counsel' . . . represents to its clients that the services of that lawyer are available to [clients of] the firm."[75] Thus, it is considered to be false lawyer advertising if a lawyer is held out to be "of counsel" without such a "close and regular" relationship.[76]

In addition, when it comes to conflicts of interest, the "close, personal and regular" relationship that the "of counsel" title requires becomes a double-edged sword. While the "of counsel" relationship may permit a law firm to offer broader services without full-time revenue sharing and liabilities, it also leads to the nearly unanimous conclusion that of-counsel attorneys are held to be fully affiliated with the firm for purposes of imputed disqualifications.[77] That is, conflicts that an "of counsel" attorney has are imputed to all members of his

71. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990), *reprinted in* 3 ABA FORMAL OPINIONS, *supra* note 56, at 49, 51 ("Use of Designation 'Of Counsel'"). *See generally* Barbara B. Buchholz, *Of Counsel: It's Not Just for Retiring, Anymore*, 81 A.B.A. J. 70 (1995). It is important to note that the 1990 Formal Opinion No. 90-357 expressly disavowed parts of Formal Opinion 330 and various prior Informal Opinions. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990), *reprinted in* 3 ABA FORMAL OPINIONS, *supra* note 56, at 49.

72. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. c(ii) (2000) ("A lawyer is of counsel if designated as having that relationship with a firm or when the relationship is regular and continuing although the lawyer is neither a partner in the firm nor employed by it on a full-time basis."); *Id.* § 9 cmt. f (describing the various forms an of counsel position may take).

73. As of August 2000, my research assistant and I identified twenty-seven states that have addressed the of counsel relationship, and each jurisdiction has either expressly adopted the ABA's language or used remarkably similar language. A string cite to demonstrate this seems excessive. *See, e.g.*, People v. SpeeDee Oil Change Systems, Inc., 980 P.2d 371, 383 (Cal. 1999) (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990) and Buchholz, *supra* note 71, at 70–74).

74. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990), ABA FORMAL OPINIONS, *supra* note 56, at 50.

75. San Francisco Bar Ass'n Ethics Comm., Formal Op. 1985-1 (1985).

76. *E.g.*, CAL. R. PROF'L. CONDUCT ANN. 1-400(E), 1-400 standard (8) (West 1996).

77. *E.g.*, *SpeeDee*, 980 P.2d at 384; ABA/BNA, LAWYERS' MANUAL ON PROF'L CONDUCT 91:501 (2001).

of-counsel law firm (and vice versa).[78] The ABA made this clear in Formal Opinion 90-357,[79] and of fifteen state jurisdictions in which I have found authority on the question, fourteen adopt the ABA imputation position, as does the Restatement.[80]

As for law professors, at least one State Bar (Florida) has expressly ruled that a full-time law professor may properly be listed as "of counsel" to a law firm, where that professor was a member of the State Bar, made himself available by phone to the firm "on a daily basis" and in person on weekends, and did "not practice law independently or with any [other firm] . . . ."[81] By contrast, the North Carolina State Bar rejected the concept, but only because the law professor was not licensed to practice law in North Carolina, where he proposed to be listed as of counsel.[82] The North Carolina opinion gives no indication that the relationship would not otherwise have been approved.[83]

Thus it seems that the conflicts rules must apply to the law professor who also practices as "of counsel" to a firm.[84] If, as Bruce Green suggests, a law school faculty is a type of law firm,[85] then are the matters of all fellow faculty members brought into the of-counsel law firm(s) for conflicts purposes? That is, would the conflicts that one faculty member has be attributed to all other professors, and then be carried with each professor into whatever firm they associate with as "of counsel?" The absurdity of this result is one reason that law faculties cannot have the law-firm-like status that Professor Green suggests.[86]

A. Results of One Informal Survey for "Of Counsel" Law Professors

In September 2000, I sent letters to the Deans of over 160 ABA-

78. *See SpeeDee*, 980 P.2d at 384.

79. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 90-357 (1990), *in* II CALIFORNIA COMPENDIUM ON PROFESSIONAL RESPONSIBILITY IIB-124 (1997).

80. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 123 cmt. c(ii). Again, a string cite seems excessive (*see supra* note 74). Rhode Island, however, has rejected the ABA imputation position in a situation where the associated lawyers were in different cities and maintained separate client files inaccessible to the other lawyers. R.I. S. Ct. Ethics Advisory Panel, Op. 97-06 (1997).

81. Fla. State Bar Ass'n Comm. on Prof'l Ethics, Op. 75-41 (1976), *available at* 1976 WL 21199.

82. N.C. State Bar Ass'n Ethics Comm., Op. 25 (1987), *available at* 1987 WL 383552.

83. *Id.*

84. *See supra* notes 81–82.

85. Green, *supra* note 9, at 303.

86. *Id.*

accredited American law schools, asking them to identify "any member of your full-time faculty who also holds an 'of counsel' position at a firm."[87] Responses were received from personnel at sixty-six schools.[88] The range of these responses was in itself interesting. One school indicated that no faculty member was "of counsel" and assured me that such a status would be at war with the "culture" of that school. Another top-ranked school told me such relationships were forbidden by its internal regulations but, upon further inquiry, declined to discuss its individual professors who appeared to have substantial "outside business activities." In contrast the dean of another prominent law school indicated that practice relationships such as "of counsel" were encouraged because "the best validation of one's work is that clients in the public sector are willing to pay for it."

Of the sixty-six responding schools, twenty-seven identified full-time faculty members who have formal of counsel relationships with law firms.[89] A number of schools had more than one of counsel on the faculty, so that a total of forty-five of counsel law professors were reported at AALS-approved law schools.[90] Because this number represents only the voluntary or "known" identifications[91] from only one-third of all AALS schools, I think we can safely assume the actual number of practicing "of counsel" law professors is significantly higher.

A question that immediately occurs is, do these numbers represent an increasing, decreasing, or "flat" phenomenon? Like many such historical questions, the answer is unclear and seems to depend to some extent on where you sit and what point you adopt as your baseline. Legend has it that law schools began as places where practicing lawyers gathered to train future lawyers and that the concept of a full-time law teacher was initially unusual.[92] In 1962 the AALS noted that "[u]ntil the Nineteenth Century, the law teacher was usually either a lawyer or a judge who taught as an avocation."[93] Similarly, Dean McKay noted in his 1971 article that "[u]ntil the

87. Letter from Rory K. Little, Professor of Law, University of California, Hastings College of Law, to ABA-accredited law schools (September 15, 2000) (on file with author).

88. *See infra* Appendix (reporting results by school). The individual responses are all on file with the author. Other than publishing the general results as an Appendix to this essay, I have decided to keep my report of these responses anonymous, in hopes of not discouraging such candor in the future.

89. *See infra* Appendix.

90. *Id.*

91. That is, responses were often qualified by adding "that I know of."

92. SELECTED READINGS, *supra* note 16, at 363.

93. *Id.*

second or third decade of the twentieth century most law teachers were practitioners and judges who taught part time."[94] As of 1971, however, Dean McKay stated that the phenomenon of "part-time practice" by law professors was "unusual," and claimed that "the practice is now on the decline."[95] If Dean McKay was correct in 1971, then we may be witnessing an increase in the phenomenon today.[96]

Certain subject areas appear to lend themselves more readily to "of counsel" professorial relationships: tax law, to take the most prevalent example, appears to translate easily and relatively commonly into "of counsel" practice. This also appears to be true of estate or wills and trusts law. Thus, a number of law schools have tax professors (or estate, wills, or trust law professors) who are also "of counsel" to law firms. This does not seem surprising: tax and estates practice would seem to have a more defined and predictable practice time-frame than, for example, litigation-oriented subjects. Perhaps a tax law professor can take on assignments knowing with relative certainty how long they will take and when they will begin and end, so that regular teaching obligations are not unexpectedly or adversely impacted by the "of counsel" practice. Moreover, tax and estate law matters are predictably remunerative—again, perhaps more so than litigation.

Today, legal mediation and arbitration also seem to be increasing areas of outside law professor practice (if not "of counsel" relationships). And very recently a nationally-prominent intellectual property professor, Larry Lessig, announced that he was signing on as "of counsel" to a leading Bay Area law firm, while Professor Walter Dellinger has signed on to manage the national appellate practice of another firm.[97]

---

94. McKay, *supra* note 17, at 48.

95. *Id.* at 49, 57.

96. In April 2001, an unusually high-profile "of counsel" announcement was made by a prominent law firm, which announced that Stanford intellectual property and constitutional law professor Lawrence Lessig was joining the firm as "of counsel." Brenda Sandberg, *Five Elevated to Partner at Townsend*, THE RECORDER, April 5, 2001, at 7. Professor Walter Dellinger of Duke University School of Law has also recently been announced as a supervisory attorney in the nationally-prominent firm of O'Melveny & Myers while apparently still maintaining his professorship. *People: Duke University*, THE NEWS & OBSERVER (RALEIGH, NC), Sept. 15, 1998, at B5, *available at* 1998 WL 6155283; *Inadmissible*, LEGAL TIMES, Aug. 10, 1998, at 3.

97. *See* Sandberg, *supra* note 96 (reporting that Lessig was appointed special master in the Microsoft antitrust case, and named one of the country's 100 most influential lawyers in 2000); *People: Duke University*, *supra* note 96, at B5.

B. *Why a Law Faculty is Not a Multi-Disciplinary Practice*

Elsewhere in this volume Professor Bruce Green suggests (tongue firmly in cheek, I hope) that law schools might be viewed as "Multi-Disciplinary Practice" law firms ("MDPs" in the current vernacular).[98] This seems clearly[99] incorrect, for one reason above all—law professors are not required to, and generally do not, share any "outside" income they may generate. In fact they generally do not even discuss it; generating income beyond one's academic salary is a well-guarded secret among even otherwise collegial law school faculties. Law school professors are gathered in one place and associated primarily for the purpose of teaching and incidentally for scholarship. They are not a law "firm" at all, but rather (and rather obviously) a collection of iconoclasts practicing (if at all) alone. They are gathered together only for the convenience of imparting their knowledge to large groups of paying students. But for purposes of outside income generated by law practice, law school faculties are a virtually impregnable bastion of "eat what you kill" law-business institutions.

Perhaps it should not be this way. After all, I garner intellectual and moral, as well as physical and resource, support from my faculty colleagues. I bounce ideas and theories off them (although concededly not often enough to save me from error), and I do this (though I may not always say so) even when related to private consulting in which I am engaged. I also use the school's resources to some extent: computers, printers, telephone, fax, pens, paper, light, and heat. Perhaps law professors who generate private income should be required to "pool" some of it back to their colleagues or, at least, to the school in general.[100]

---

98. Green, *supra* note 9, at 303; *see generally* Symposium, *Future of the Profession: A Symposium on Multidisciplinary Practice*, 84 MINN. L. REV 1 (2000); Symposium, *The Brave New World of Multidisciplinary Practice*, 50 J. LEGAL EDUC. 469, 469–521 (2000).

99. As my law school contracts professor, the brilliant and far-too-early departed Arthur Leff, used to tell us, "Watch out for 'clearly.' It generally means 'I have no authority for what I am about to say.'" For a brilliant Leff article addressing ethics, *see* Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229 (1979).

100. I personally write an annual $200 check to Hastings to cover incidental supplies and expenses related to my (small) practice of paid consulting. Of course our CFO has no idea what to do with this, other than deposit it in the general fund. I also make it a point never to use school staff—secretaries, research assistants, and the like—in my commercial activities. But these are personal choices I've made and are, so far as I know, not required nor requested nor even discussed with the Administration.

C. *Advantages and Disadvantages of Paid Law Professor Consulting*

The practice of law professors actually practicing some law has certain advantages, and disadvantages. Here's a partial list:

Advantages:

1. *Better Professoring*: Actual law practice expands a professor's knowledge and experience. It usually forces the professor to confront new issues and new legal procedures, examine issues that have current relevance, and test ideas in the crucible of the "real world." This experience in turn makes the professor a better (1) scholar, (2) teacher, and (3) advisor to students.

2. *Institutional Reputation*: Law professors who assume prominent roles in actual litigation or legal matters are generally (although not universally) good for the public reputation of their institution, both in the world of lawyers and judges as well as the community at large.

3. *Money*: Allowing professors to earn some outside income permits law schools to retain professors who otherwise might find the draw of higher law-practice salaries hard to resist. While there are many "non-pecuniary benefits" to teaching that can substitute for dollars, the opportunity to *also* enjoy some outside pecuniary gain may make the difference to some talented lawyer-professors.

4. *Benefits to Community*: If law professors who engage in outside practice also testify publicly, or later present their experiences in public lectures or published works, they can improve the community's understanding of complex or obscure legal issues. Assuming the integrity of the professors, this is an unmitigated good.

Disadvantages:

1. *Time*: Outside work plainly takes the professor's time away from students, colleagues, and the institution. Thus the informal "twenty-percent" rule for outside work makes sense: on average, no more than one day a week should be devoted to outside work of any kind. (Whether a week should be counted as five or seven days, and whether the "one day a week" period can be aggregated for periods of intensive legal work, are questions open to lawyerly interpretation.) Law schools should not hesitate to seek to enforce this rule-of-thumb against persistent abusers.

2. *Distortion/Bias*: Along with Professor Kaufman, I have no doubt that acting in a paid consulting capacity can subtly (if not consciously) change one's view or develop one's view in the direction

that favors the client.[101] Lawyers are masters of rationalization and, I believe, self-deception. I have never met a lawyer who did not have an intelligent and well-developed rationale for why his client's position was "right."

However, as Professor Bruce Green has stated, "[e]verything I've written has been influenced by something."[102] Conscious adoption of a position a professor knows he or she does not believe is, in my opinion, an unrealistic hypothetical—a chimera rather than a reality we need to guard vigilantly against. Law professors are for the most part stubborn, independent thinkers by nature.

But the question whether there is a possibility of unconsciously developing a bias the professor otherwise would have rejected, is a separate issue. It strikes me as a real danger, more pernicious because it is not consciously engaged. More to the point, however: with disclosure rules like the new AALS Statement, I am relatively confident that this disadvantage is outweighed by the advantages noted above.

3. *Silencing Scholarship*: A real cost of outside expert consulting by law professors is that they may consciously decline to state strong opinions on some issues, for fear of providing material for their future impeachment if they are witnesses at trial or deposition, or losing business because they are impeachable. Professor Green's current article actually embodies (if unconsciously) this possibility.[103] Or, as Carol Langford (a prominent practicing lawyer, part-time teacher, and ethics casebook author) has candidly remarked, "expert witness work does put limitations on professional writing . . . . I would never write a law review article on [a particular topic relevant to my practice] . . . [b]ecause it might mean I lose out on getting hired as an expert witness . . . ."[104]

I think this is a serious danger—indeed the most pernicious of all, if it is real. If a professor's practice silences scholarship, then it is an

---

101. *See supra* note 58.

102. Richard B. Schmitt, *Rules May Require Law Professors to Disclose Fees*, WALL ST. J., Jan. 31, 2000, at B1 (quoting Professor Bruce Green).

103. *See* Green, *supra* note 9, at 302 (because "any criticism we level is sure to be turned back on us," Professor Green describes his hypotheticals as "entirely fictional" and states that "whatever views are expressed in this work do not necessarily coincide with my own").

104. Posting of Carol Langford, langford@usfca.edu, to legalethics-l@lawlib.wuacc.edu, (Feb. 15, 2000) (copy on file with author). Ms. Langford's well-received casebook is RICHARD A. ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW (Michie 1995). *See also* Professors in the Marketplace, *supra* note 27, at 17–18 (questions posed by Professor Richard Able).

unmitigated *bad* for law professors and the profession.

I am not sure, however, how real this phenomena is. I think we need more information. Most full-time law professors are dying to *express* and publish their opinions. A law professor's only currency is the power of his or her opinions and ideas, and the scramble that I have observed is to publish, to speak, and to proselytize one's opinions, not to silence them.

Perhaps a silencing phenomena does kick in, but only when a professor has, by publishing, reached a level of prominence that makes him or her a regularly valuable lawyer or consultant to paying clients. If prominent scholars are truly silenced, or even muted, by the paid legal practice that their prominence makes available, then this is a danger about which we should be deeply concerned. However, how we could possibly hope to ban it, if it applies only to law professors with the greatest prominence, seems insurmountably problematic.

4. *Conflict with Institution*: Law Professors need to be careful, I think, to avoid taking actual lawyer-conflict positions vis-a-vis their schools. The law school should be considered the professor's first "client," and whether taking on matters in opposition to the school itself violates conflict of interest rules is a question we should consider.[105]

D. Recognizing and Harnessing the Practice

Professor David Luban has powerfully articulated some of the reasons that some talented lawyers decide to teach rather than practice.[106] Yet, as Professor Charles Ogletree has confessed, law teaching can also reasonably be viewed as a "full-time job[] with part-time responsibilities."[107] In light of this, perhaps the truly astounding point is how few law professors actually engage in outside paid legal work. The amazing thing about lawyers committed to scholarship is not that some of them also consult, but that more do not.[108]

---

105. Model Rule 1.7, for example, states that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to . . . a third person, or by the lawyer's own interests . . . ." MODEL RULES OF PROF'L CONDUCT R. 1.7 (1999).

106. *See* Luban, *supra* note 1, at 67–72.

107. Professors in the Marketplace, *supra* note 27, at 18 (recording section of the Panel discussion led by Professor Charles Ogletree).

108. *Cf.*, regarding the humble bumble bee, "The amazing thing is not that it flies badly, but that it flies at all." *See generally* John H. McMasters, *The Flight of the Bumblebee and Related Myths of Entomological Engineering*, 77 AMERICAN SCIENTIST 164 (Mar.-Apr. 1989).

All the foregoing advantages and disadvantages—and likely others I have missed—need, first, to be recognized and refined. We need a more candid discussion of all these aspects of law professors-as-lawyers than has occurred up until now. My own candor in this piece is intended to contribute to further honest discussion.

Once we have candidly and unashamedly exposed and examined the practice of law professors practicing law, my firm view is that we should then harness the phenomena, not ban or ignore it. We should act to use and augment the advantages, while taking reasonable steps to cabin the disadvantages. If we are to whip—self-flagellate—ourselves, it should be in order to encourage better performance and more beneficial results for our students and schools, not to punish or discourage the practice.

For example, law schools should consider demanding that some portion of outside income earned by full-time professors be shared with the school, at least to cover a *pro rata* portion of costs if nothing else.

Second, law professors who practice might be required to share their experience with the law school community via presentations to students and (or) colleagues, an article in the alumni magazine, or advice to relevant student organizations or students seeking jobs in the field. That is, practicing law professors should be required to "give back" to the academic community not just money, but also time and knowledge.

Third, I believe wholeheartedly in David Luban's and Deborah Rhode's published view that law professors have a pro bono obligation no less than that of practicing attorneys.[109] Model Rule 6.1 sets an aspirational standard for lawyers of fifty hours (one hour per week) of pro bono legal services work per year.[110] Law faculties should be urged to find ways to meet this standard. This is particularly appropriate for law professors who also use their position to practice law for money.

109. Luban, *supra* note 1, at 58 (Law teachers and law schools have the same pro bono responsibilities as lawyers and law firms. By 'pro bono' I mean something more particular than community service or civic involvement. I mean free or reduced-rate legal work for those who cannot afford to pay for it.) *See also generally* Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999) (addressing the need for increased pro bono commitment among law professors and law students).

110. MODEL RULES OF PROF'L CONDUCT R. 6.1 (2000).

VII. CONCLUDING THOUGHTS

I am a lawyer, and the ABA suggests that I should exhibit "truthfulness in statements to others."[111] California statutes direct that I must employ "such means only as are consistent with truth" and that I may "never . . . seek to mislead . . . any judicial officer."[112] As an active member of the California State Bar, and assuming some of you in the audience may be judges or at least attorneys serving as "officers of the court," I feel I must give you my honest opinion. I do not think that law professors serving as legal consultants or expert witnesses or even as formal "of counsel" to law firms are practices that we should ethically condemn. The ethical problems that may arise are in the execution of the roles, not the roles themselves.

Of course, I practiced law for a decade before coming to full-time teaching and have engaged in paid consultant work consistently, albeit not frequently, since my appointment to the Hastings law faculty.[113] Would I have my forgiving opinions on this topic if I did not have this experience? I do not know; as a former litigator, I share Professor Andrew Kaufman's view that being paid can often transform one's perspective.[114] But I am confident this is no different than any other experiential shaping of our opinions, and I wholeheartedly agree with Professor Green's argument that legal opinions and arguments must be tested on their merits, apart from any possible bias perceived in those who advance them.[115] "Truth will out" in the law, and opinions developed solely out of bias rather than logic or substantive merit will not long survive.

Does this mean we should not be careful about the ethics of law professors, or not make efforts to detect and even discipline abuses? Of course not. Disclosures should be required, and silent skirting of

111. This is the title of Model Rule 4.1, not its black-letter. MODEL RULES OF PROF'L CONDUCT R. 4.1 (2000). Rule 4.1 actually states that "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." *Id.* The Comments then "clarify" that "generally accepted conventions in negotiation" permit certain false statements, and that a lawyer "generally has no affirmative duty to inform an opposing party of" the truth. *Id.* 4.1 cmt. [1], [2]. Thus, I characterize truthfulness as a "suggestion," rather than an ethical requirement, under the Model Rules of Professional Conduct.

112. CAL. BUS. & PROF. CODE § 6068(d) (West 1990).

113. My self-imposed rule has been to take only three expert witnessing matters per year, with intense work restricted to the Christmas or summer "breaks."

114. The Ethics of Ethics Consulting, *supra* note 27, at 8.

115. *See* Green, *supra* note 9, at 335–44. While Professor Green says the arguments in his article "do not necessarily coincide" with his actual views (*id.* at 302), I don't believe him.

ethical rules should not be countenanced. But I do not think we have to worry about most law professors selling their souls for expert witnessing fees or even of counsel stipends. The talents (if not the souls) of those who are so inclined can demand a far higher price on the undisguised open market of law practice, and only those talented souls who still value aspects of the academy, including its more restrained ethical and cultural norms, will stay long.[116] As for less talented souls on full-time law faculties, they may indeed find their opinions shaped by their clients. But their influence will not linger long nor will their opinions survive the scrutiny of the academy itself. Such influences do not separate us from the profession we claim to engender. They are, I think, a small price to pay for the luxuries of academic freedom.

In the end, perhaps the best check on the dangers of paid consulting work by law professors is the hiring and tenure process that the best law schools already have in place. A six or seven year process that requires published scholarship before tenure—and except in cases of already well-demonstrated commitment to teaching and scholarship, I would advocate keeping the tenure process long, not shortening it to three or four years, even for older, experienced lawyers or high-powered "genius" candidates—performs at least two valuable functions toward inoculating the institution against "creeping consultantism." First, it inculcates the would-be scholar in the shared values of the academy: neutral scholarship, freedom of expression of ideas, commitment to publication and to unpaid public service. Second, it gives a law faculty ample time to evaluate the true character of the professor: is he or she committed to scholarship? Are law professor tenure candidates unable, in a sense, to control their desire to influence public policy and express their opinions, regardless of whose ox is gored? Are they, in short, "compulsive scholars"?

For the most part, we grant tenure only to the compulsive scholar,[117] with some exceptions around the edges for needed diversity of experience and skills. But diversity in legal education is, in fact, vitally important. In fact it is, I think, an ethical obligation of the institution to provide students with a diversity of legal models and educators. As Professor Green puts it in his article, "there is a place in

116. As David Luban points out, "The one thing that all nonclinical [law] teachers have in common is that all have chosen teaching over law practice." Luban, *supra* note 1, at 66. This choice shapes our "professional identit[ies]." *Id.* at 67.

117. As Professor Laurie Levenson has said, "By the time you get tenure, you understand." Professors in the Marketplace, *supra* note 27, at 18.

legal academia for practicing lawyers."[118] Every law school can use one or two Arthur Millers or Laurie Levensons—in fact, the national (and well deserved) media reputations of these professors are hugely beneficial to their schools. We just do not want (nor would we likely survive) an entire faculty of them.

There will never be a shortage of "pure," compulsive scholars on law school faculties. But our faculties are also enriched, I think, by a scattering of "practicing lawyers" who also produce scholarship. We should stop whipping ourselves about whether law professors should also practice and instead acknowledge that they do, and then go about the legitimate business of harnessing our practicing colleagues to the greater institutional good.

APPENDIX

Survey of AALS Law Schools Regarding "Of Counsel" Professors on the Full-Time Faculty

School	Responses					
	None	Don't Know	Will Ask	Used To	Yes	Number
Arizona	X	X				
Arizona State	X			X	X	2
Arkansas, Little Rock	X					
Boston College		X				
Brigham Young	X					
California Western	X					
Campbell					X	2
Chicago-Kent	X	X				
Cleveland - Marshall	X	X				
Connecticut					X	1
Detroit, U. Mich.					X	1
Drake					X	1
Duke	X					
Emory					X	2
Fordham	X					
Franklin Pierce					X	4
Georgia	X			X		
Harvard	X					
Hastings					X	1

118. Green, *supra* note 9, at 337.

	None	Don't Know	Will Ask	Used To	Yes	Number
Indiana					X	1
Indiana University	X					
Iowa	X					
Kansas					X	2
Louisiana State	X			X		1
Loyola New Orleans					X	1
LUC (Dean Appel)					X	1
Mercer U.	X					
Minnesota					X	1
Nebraska	X					
Northeastern	X					
Northwestern					X	3
Notre Dame	X			X		
Nova Southeastern			X			
NY Law School	X					
NYU					X	2–3
Ohio Northern	X					
Ohio State	X					
Oklahoma U.					X	1
Pace			X			
Pepperdine	X			X		
Puerto Rico	X					
Regent					X	2
Richmond	X	X				
Rutgers	X			X		
Saint Louis	X					
Santa Clara	X			X		3
Seaton Hall					X	1
Seattle					X	1
South Carolina					X	1
South Dakota	X					
St. Marquette	X			X		
St. Mary's Tex					X	1
Tennessee	X					
Texas Southern					X	1
Thomas Jefferson	X					
Toledo					X	2
U. Akron					X	1
Vanderbilt				X		

	None	Don't Know	Will Ask	Used To	Yes	Number
Washburn	X					
Washington & Lee	X					
West Virginia					X	2
Widener U.	X					
William & Mary	X					
Wisconsin					X	1
WSU	X					
Yale					X	1
Totals: 66	36	5	2	9	27	44–45